IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

EUGENE L. SWANN,	)	
	)	
Plaintiff,	)	
v.	)	C.A. No. 1:14CV1409 (GBL/JFA)
US FOODS, INC.	)	
	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

COMES NOW your Plaintiff, EUGENE L. SWANN, by counsel, and hereby submits this Memorandum in Opposition to the Motion for Summary Judgment filed by the Defendant.

Statement of Disputed Issues of Material Fact

References below are to numbered paragraphs in Defendant's Memorandum.

2. & 3. Although there is no dispute that Defendant has "always had a zero tolerance policy," at least on paper, there is as to what the policy meant, in practice. Defendant's 2011-related "heightened awareness" assertions really go to the practice under that policy, which has been anything but demonstrative of a "zero tolerance" [instant or automatic discharge] nature. Excerpts from the deposition of the HR Coordinator, Ayers, are attached at **Exhibit #9**. Ayers says that zero tolerance means that if anyone if someone has been threatened, verbally or physically, "it is reported and investigated." Ayers, Exh.#9, 41:11-18. No discipline of any driver occurs without [the Transportation Manager] Pillion knowing about it. Swann Aff., ¶ 54 [and Pillion testimony cited therein]. Pillion Deposition Excerpts not otherwise discussed and/or controverted by Swann in his Affidavit, are attached hereto at **Exhibit #1** to this Memorandum. Pillion has known about the workplace violence policy for "years and years," and nothing stands out to him as having changed about the policy. Pillion, Exh.#1, 98:6-22.

Pillion, acknowledges that Kelvin Howard, another driver, was suspended for a workplace violence incident involving a Routing Supervisor, Bruce Hommel. Pillion, Exh.#1, 15-16:16-09. Pillion states Howard was suspended for getting into an altercation with a dispatch supervisor [Pillion, Exh.#1, 21:5-10], and expresses no recollection of a prior incident involving Howard being aggressive towards a customer. Exh.#1, 99:16 – 101:8. Howard Deposition excerpts are collected at **Exhibit #2** to this Memorandum. He is and has been a delivery driver for US Foods for about 13 years [Exh.#2, , 3:18-4:12], and does not suffer from any medical conditions, and has never been hurt on the job. *Id.*, at 7-8:20-01. Pillion has been Howard's supervisor all 13 years. Exh#2, 8:12-20. Pillion disciplined Howard by sending him home twice. *Id.*, 9:10-19. The first incident involved a dispute over a route with a supervisor and dispatcher, Bruce Hummel [sic; Hommel]. *Id.* , 9:20 – 10:10. Another driver was given a preferred route, where Howard had as seniority preference, which would be lost after 4:00 a.m., and Hommel said Howard arrived at 4:01 a.m., and had already assigned the route to the next guy. *Id.*, 12:2-16. Howard was suspended one day as a result of this confrontation with Hommel. *Id.*, at 20:16-22. Hommel [the Supervisor] claimed Howard had threatened him by saying he would take Hommel outside and beat him up, but Howard denied saying this. *Id.*, at , 32:5-15. Howard also states Hommel got in Howard's space. *Id.*, at 88:19-22. Howard states he was told Hommel was also disciplined in some sort of way for what he said or did in the situation. *Id.*, at 72:2-18. As far as Howard knows, Pillion made the disciplinary decision with the input of HR. Howard, *Id.*, at 34:1-16. The HR Director, Rutherford, for whom deposition excerpts relevant to this memorandum are collected at **Exhibit #3**, states that this occurred before she came to the Manassas office [Exh.#3, 125:10-16], but her understanding is that it was a disagreement over a route, and they were “headbill to headbill” (hats touching each other).

Exh#3, 126:9-20. Howard received a "write-up" in his file for that. Rutherford, Exh.#3, 127:12-16. She states that workplace violence "obviously" did not happen; otherwise Howard would have been terminated. Rutherford, Exh.#3, 128:4-16. If, as Defendant claims, the policy was truly of a zero tolerance nature, then or now, it should not make any difference whether Rutherford, or some other person was the "involved" HR Official, for purposes of comparison status, according to what Rutherford says. Pillion is the involved and initiating management official as to all disciplinary situations discussed above and below, and with Swann, and, if there were not a material issue of fact as to whether the policy, *in practice*, was implemented in a "zero tolerance" fashion, as Defendant seems to contend, if Rutherford had actually made a determination, on October 31, 2012, as memorialized in her "Executive Summary" of findings as to Swann's alleged policy violation, filed in the administrative proceedings, and produced by Plaintiff as EEO-17-18, copy at **Exhibit #4**, that Swann had violated the workplace violence policy [Swann denies this, and says Rutherford called him on the October 31st, telling him that her finding was that he had done nothing wrong, and that it was up to Pillion when as to when he would be brought back, Swann Aff., ¶ 58], then presumably, the termination of Swann should have been a foregone conclusion, as result of her supposed finding that the written policy had been violated, and there would be nothing left to "decide" in the November 1 conference call. But this is not what US Foods claims. Despite her claim of having found Swann violated the policy on 10/31, Rutherford said the decision to terminate Swan took place in a conference call the next day, November 1, and further claims the decision to terminate Swann was not made by any one person before November 1, but was made in a telephone conversation she is instructed by Defendant's counsel not to talk about, because allegedly privileged; she does not recall furnishing the participants in the call anything in writing beforehand. Rutherford, Exh.#3, 11-

13:16-10. In further regard to the *practice* under the policy, Howard was also disciplined several years prior for having words with a customer at a Ledo Pizza in Reston. Howard, Exh.#2, at 48:4-13; Declaration of Robert Niggel, copy attached at **Exhibit #5**. Howard denies threatening the customer, but says the customer threatened to kill him. *Id.,* at , 52:6-11. He says the "office" was notified by someone other than him (53:18-21), and he was not sent back there (54:22-55:04) and the disciplinary action was being "banned from the route." (57:7-15). Swann also recounts an event he witnessed on his own, in which two drivers got into words in the parking lot of the Manassas US Foods yard, over a stolen girlfriend situation, where Pillion was also present, and one of the driver's was called the "n-----" word by the other, and the other [jilted one] also threatened kick the other driver's ass. Swann personally witnessed the driver complain to Pillion about what had just happened, and Pillion said he would "take care of it." Both drivers involved were still employed at the time of Swann's termination. Swann Aff., ¶44. Although Defendant claims a vague "heightened awareness" under the policy starting in 2011, it is difficult to see what this means. Before there was ever any conflict with Swann, Transportation Manager Joines had already been told that Abdullah had accumulated a history of aggravation with customers [Swann, Aff., and testimony cited therein, ¶ 42., and Summers had previously complained to Pillion about Abdullah's frictional attitude in reference to Abdullah belligerently refusing to move an improperly parked rig in the yard, Swann Aff., ¶ 42 [and Summers testimony discussed therein]. Ifthere were truly "heightened awareness," in practice, Abdullah would not have been sent out on his route the morning of the supposed violence incident with Swann, and, as above, the "decision" would have already taken place as a result of the alleged finding of the policy violation.

6. As discussed in connection with 3 and 4 above, the record evidence, and

inferences therefrom, indicate that not every *driver* at Manassas, who has violated, or engaged in acts which would be in violation under *any* iteration of the policy (which has allegedly been "zero tolerance" all along), was terminated, all of which situations involving Pillion: Howard, Hommel, and John [the jilted boyfriend of the female driver].

7. Plaintiff signed acknowledgments of receipt of defendant's policies, procedures, and handbook, and was provided a CD-ROM of policies at one point, but he was not aware of the specifics of any of them, and being so unaware, cannot be said to have "understood" Defendant's alleged workplace violence policy. Swann Aff., ¶¶

9. While Plaintiff did take FMLA leave back in 2008, and 2009, and did receive written notification of his rights under the FMLA as to physical injuries and conditions not formally claimed to have occurred at work, or the subject of a workers' compensation claim, because that situation was not treated by US Foods as a job injury situation, it was handled through the US Foods third party FMLA administrator, and FMLA policy and procedure; however, there is a genuine issue of material fact as to whether Defendant treats injuries claimed to be job-related, and absence need periods relating to those the the same as "personal" [not claimed to be job-related] injuries. The discovery record is devoid of evidence that Defendant provided Plaintiff with any notice of rights under the FMLA, at any time after his 2012 injury and subsequent treatment. Pam Ayers, the "HR Coordinator" at US Foods for 12 years, stated that part of her job is to make medical appointments for employees injured at work, but she stated that US Foods does not make appointments, however, regarding employees "personal" injuries. Ayers, Exh.#9, 4:14-17; 6:9-16; 7:7-21.

12. Ayers "told him to go for an evaluation" is not true. Swann was instructed to go for a "re-evaluation," as part of US Foods' apparent undertaking to steer him to their company

doctors, and as the beginning of a sustained pattern of interference and dictation of conditions relating to the Plaintiff's obtaining medical care, as well as interference with his ability, or rights, to take time off from work, or leave, for purposes of seeking treatment, care, and and/or attending appointments. Swann Aff., ¶¶ 4-8 [and related exhibits]. Swann otherwise would have gone to the doctor Mercy Hospital referred him to, for "re-evaluation," as well as follow-up treatment of, his injury and physical state. Ayers required Swann to go to Patient First. Swann did not choose to go to Patient First, and had no say in the subsequent referrals and providers, for purposes of evaluation or treatment. The notion that Swann somehow chose, on his own, to go to a walk-in clinic that was "available to US Foods employees who have reported a workplace injury" improperly imports the notion that there was some sort of act of unconstrained volition on the Plaintiff's part to go to Patient First that day, which is not the case. *Id.*

13. While it is undisputed that Patient First gave Swann a ten pound lifting restriction, left out from this allegation is the rest of the restrictions Patient First gave to Swann, which were: no pulling or pushing of trolley[s] [sic; dolley[s]s], and no driving until evaluated by an "orthopedics specialist," Swann, Aff., ¶5, and Exh. D. Plaintiff was initially referred by Patient First not to "an orthopedist," as contended by Defendant, but to a Dr. Joseph Magalski, who may or may not be an "orthopedist" or orthopaedic surgeon; however, Defendant's HR employee, Ayers contacted Patient First "on behalf of the pt." [Swann Aff., Exh. D; not authorized by Swann], and had the referral changed (without Swann's knowledge or consent) to be to Dr. John Biddulph. Ayers told Swann that if he did not go to Biddulph, he would be fired. Swann Aff., ¶7. Dr. Magalski was the second doctor Plaintiff had been referred to, after being steered away by US Foods from the first referral, which was to Vipul Nanavati, M.D, a doctor located near Mercy Hospital, where Swann had initially sought treatment. Swann Aff., ¶ 3 [and Mercy Disch.

Summary & Instr. at Exh. A thereto].

14. Again, while it is undisputed that Plaintiff saw Dr. Biddulph on June 29, 2012, so much of this allegation as seems to imply that Biddulph "stated" *to Swann* what the work restrictions were, is disputed. Swann Aff., ¶7.

15. "Consulted" is probably too genteel a verb to describe what occurred as between Swann, US Foods, and the doctors who saw him for physical complaints he had after the June 21, 2012 injury; again, Plaintiff did not have any choice in the providers used, or even when and how appointments were made with them, rather, he was ordered by Pam Ayers and US Foods, to go to Patient First, and Dr. Biddulph (on threat of termination if he went to another provider), and Dr. Cohen, supposedly for diagnosis and/or treatment, on threat of termination of he chose to go to any other provider. Plaintiff obeyed the US Foods orders regarding to whom to go, and when. Swann Aff., ¶¶ 6-10.

C. Plaintiff's Work after June 2012 Injury

16. Griffith denied authorship of the June 29, 2012 e-mail referenced as setting forth Swann's limitations [Swann Aff., ¶¶ 10-12. (and Exh. G, H and I and J thereto)], and Griffith agreed that the light duty assignments and schedule, and tasking more likely came from Mike Pillion. Swann Aff., *Id.*

18. There is a genuine issue of material fact as to whether the Transitional Work Agreement Plaintiff signed was not so much for the purpose of defining his duties and obligations, with respect to light duty, or accommodating him [although if honored, it certainly would qualify for that effect], so much as to also set up a possible predicate for more retaliatory disciplinary action. Although the agreement (Exh. H to Swann Aff.) makes it clear that Plaintiff would be disciplined if he performed work outside his restrictions, it makes no mention of what

would happen were a management member to assign work to Swann, outside of his restrictions. Rutherford says she was not consulted in the drafting of the Transitional Work Agreement, and the manager or supervisor would not be disciplined on a first offense of assigning work outside the restrictions, but the *employee* would be disciplined on the first time around, if he or she acceded to the demand to perform work outside of restrictions. Rutherford, Exh.# 3, 178:1 to 181:9.

19. While Plaintiff "admits" that he delivered on a route, and performed office work, during part of his light duty assignment period, there is a factual issue as to just what qualified, both objectively, as well as in Pillion's mind, as the "light duty assignment period," as Pillion states that as far as he knows, the 25 pound lifting restriction was never lifted, and Swann further states that towards the end of his employment, all Pillion had him doing was shuttle work, driving full and empty trailers from one yard to another, but not actually loading or unloading any product on a route anymore. Swan Aff., ¶¶ 12 [and Exh. J thereto], 31.

D. Release Back to Duty

20. Plaintiff's release back to duty on July 16, 2012, was brought on, in substantial part, by efforts by Plaintiff to persuade Dr. Biddulph to release him to full duty, as a result of Plaintiff having been threatened by Pillion with removal of the schedule, for all purposes, if he did not obtain a "full release" from Dr. Biddulph, at the next appointment. Swann, Aff., ¶¶ 17-18.

21. While it may well be that Plaintiff was not officially under any doctor's restrictions on his activities, as of the date of his discharge, this should not be confused with Pillion's understanding of the situation, which was that the 25-pound lifting restriction had been under, never went away, as far as he knows. Swann Aff., ¶12 [and Pillion testimony at Exh. J

thereto].

22. Other than his visit to Mercy Medical Center, on an emergent basis, Plaintiff was not accorded, or given "time off" from work to seek, or obtain, or attend appointments, from any doctor, other than the doctors US Foods dictated that he go to. Swann Aff., ¶¶ 7 [go to Biddulph or be fired], 17 [full duty release or off schedule;"lost days"], 27 [captive of US Foods doctors], 29 [effort to make Swann look non-compliant with medical care directives], 31 [night shuttle schedule; unpredictable scheduling; sleep schedule during business hours], 32 [not freed to go to other doctors and not released from threat of termination if he sought continued treatment through providers of own choosing], 33-34 [requests to Ayers for time off in order to seek further diagnosis and treatment].

23. The usage: "... it is Ms. Pam Ayers' responsibility to schedule appointments for them with doctors they select from panels provided by US Foods' third party administrator, Gallagher Bassett" is actually an assertion of legal fact which has no basis in law, and US Foods has shown none. While Ayers and/or US Foods may well *see* her own duty/ies as that, there is no legal duty or prerogative, or law, under the Virginia Workers' Compensation Act, or any other law, devolving to Ayers, to usurp the function of scheduling appointments, and interfere in the physician-patient relationship, and care, and dictate terms and conditions of care, in the manner which she did. As referenced above, Swann did not select any doctor from any panel, was not offered any list of possible doctors to choose from, by Gallagher Basset, Ayers, or anyone else. Swann did not select Biddulph from a panel of physicians, and only went to Biddulph on threat of termination. None of the providers he went to were the subject of an informed choice by him, and he went to each of them under threats from Ayers and US Foods, if he did not. Swann Aff., ¶¶ 6, 7, 8, 15, 17, 19, 21-24.

24. Whether or not Ayers communicates appointments to the transportation department, and they "schedule the employee accordingly" is an assertion of that such a practice on their part existed, and not what occurred with respect to Swann in any event, as to the appointments. While it may well be that Ayers informed the Transportation Department, rather than setting up a work schedule, or leave for Swann, to take account of actually making, and not missing, an appointment, Swann was given no leave, and was not relieved of duties early enough in the day, causing Swann to miss [and Ayers to reschedule at last moment] an appointment with the neurologist, where Swann had also been scheduled to return from one of the farther away routes in Maryland, and called in, knowing he would not make it back in time. *Id.*

25. Transportation (Pillion and Williams) did *not* schedule Swann so that he could get back in time for the August 22, 2012 neurologist appointment. Rather, they put Swann on a far away route in Maryland, knowing of the substantial likelihood that Swann would not make it back in time, for the said appointment. *Id.* Swann later learned this was done out of an effort on Defendant's part to make it falsely appear to Gallagher Bassett, and the Virginia Workers' Compensation Commission, that Swann was failing to seek and obtain treatment in a timely manner, a condition to having a claim covered under the Virginia Workers' Compensation Act, which effort at creating appearances, appears to have succeeded for a period of time. *Id.* While Ayers may well claim that she "generally schedules appointments late in the day" so that drivers have sufficient time to get back from work to attend them assumes that scheduling from the Transportation end was done with an actual intent that Swann "make the appointment," and the evidence and inferences are that this in fact did not occur *Id.*

26. What Defendant gently characterizes as providing Swann with "notes" regarding the date, time and location of his doctor's appointments, refers to Ayers dictating a "done deal,"

when and where Swann would go for treatment, as well as with whom, and even, when the scheduling was factored in, whether he would actually be able to make it. *Id.* The notice provided by Ayers for the initial 7/27/12 neurologist appointment, though given to others previously, was not given to Swann, until a few days before the appointment, at which point Swann pointed out that this interfered with his preparations to leave the country on vacation, and that he should have been consulted as to the date of the appointment, to begin with. Swann Aff., ¶19.

E. October 26 Conflict Involving Abdullah

27. Defendant cites no factual support in the record for use of the word "altercation" with respect to the events that occurred on October 26, 2012 as between Swann and Abdullah.

28. The Defendant's assertion that the two men were "physically separated by Butym" is limited to the proposition that Butym inserted himself into the physical space between Swann, who was emerging from the truck, and Abdullah, who was standing over near the stairs. Though it is factually correct that Butym placed himself between these persons, the record evidence is that there was no physical behavior of any kind on the part of Swann, other than Swann expressing exception to Abdullah's seeming name-calling, or that Swann, who had been up all night already, was in need of restraint by Butym, or even that such restraint in fact occurred; Swann was not grabbed on the shoulders by Butym, or physically restrained in any way. Swann Aff., ¶¶ 40, 41. What Defendant seems to assert was an "altercation" which "continued," as would unbroken chain of alleged events or hostility allegedly unfolding between Swann and Abdullah, Exh#4 [10/31/12 Executive Summary and Finding] is actually the subject of an overall factual dispute, as to how many "encounters" occurred, and as to what the reasons were, and as to what stories Rutherford accepted, and which she did not. Swan Aff., ¶¶ 38-43 [and

exhibits thereto].

29. There is also a genuine issue of material fact as to whether Swann made any threat to Abdullah, despite what Swann wrote down on his written statement. *Id.* Swann explains that that he made it clear to Pillion, on the date of the run-in with Abdullah, as well as Rutherford, in her interviews on days following being sent home, that he said no such thing to Abdullah, but muttered this to himself while the cab of the truck, with doors closed and windows rolled up. Swann Aff., ¶¶ 45, 50. There is also a genuine issue of material fact as to whether Swann was even in the vicinity of Abdullah in the office hallway, or on the stairs, at which times Abdullah apparently claimed that Swann supposedly made other threats, and whether, given Rutherford's investigation, what her motivation was to elevate Abullah's alleged word and account over that of her own Manager, Butym. Swann Aff., ¶¶ 43, 45. Rutherford apparently decided to adopt so much of a Butym comment that he supposedly had to restrain Swann, but rejects so much of Butym's statement as says no threats were made by Swann. The accounts of what occurred, as between Swann, Butym and Bobby Summers on the one hand, and Abdullah on the other, materially differ, as to: (a) whether Swann encountered Abdullah at all, in the hallway, and on the steps of the office, and (b) whether threats were made by Swann when Abdullah came out to the cab of the truck with the Supervisor, Butym. *Id.*

30. Swann did not, as claimed in this factual assertion, simply "admit" to Pillion that he had made an oral threat to Abdullah, as alleged. Swann explained to Pillion that what he wrote on the written statement was what he had thought and muttered to himself, inside the closed truck, while Abdullah was to get a supervisor [at Swann's request]; Pillion waved the statement in the air and said "I've got you now; bottom line." Swann Aff., ¶¶ 45, 50, 52.

33. Swann did not tell Abdullah "don't get smacked in the face this morning," and

Abdullah could not and cannot "admit" that particular [false] allegation, on behalf of Swann. Swann Aff., ¶ 43. Rutherford would have had to believe, or have corroboration to support the proposition that Swann first ran into Abdullah in the hallway of the office that morning, as Abdullah apaprently claimed, as opposed to outside, while Swann was in the cab of the truck, in order for Rutherford to have concluded that Swann said this to Abdullah in the hallway. *Id.*

34. So much of this allegation about Swann being informed of a suspension by Rutherford as implies or assumes that this decision was made by Rutherford, is disputed, as the record evidence actually seems to show that the suspension directive came from Pillion, and not Rutherford, the one who was doing the investigation. Swann Aff., ¶57 [and Exh. U & hh thereto]. Pillion provides a false explanation for this, basically alleging or implying that Swann was incessantly contacting him after leaving the facility, which allegation Swann denies. *Id.*

35. Although Joines may have not witnessed events occurring as between Swann and Abdullah on the 26th, he was well familiar with the reputation of Abdullah for a short temper, and difficulty with customers. Swann Aff., ¶42 [and Exh. gg thereto].

36. There is a genuine issue of material fact as to whether the "outside the gate" comment by Plaintiff: was actually uttered to, and heard by, Abdullah [Swann explained to Rutherford and Pillion that he was in the cab with windows up and doors closed, when he muttered this to himself Swann Aff., ¶¶ 41, 45, 52, 55.

37. There is a genuine issue of material fact as to whether Swann made any comments about hitting hard, or who could hit the hardest, *to Abdullah or anyone else*, or anywhere, but to himself inside, the closed cab of the truck, while Abdullah was going back inside. Swann Aff., ¶45, 55.

38 & 39. There is a genuine dispute as to whether Butym "had to physically take

hold," or whether he actually did physically "take hold" of Swann, or make efforts to separate Swann and Abdullah. Swann Aff., ¶¶ 46-47. Swann was already headed back inside to the office anyway, and Butym merely stepped in the space between the two men, as Swann was getting out of the truck and preparing to go inside to the office, to clock out. *Id.*

40. The assertion of alleged fact that "US Foods determined both Plaintiff and Mr. Abdullah had violated the US Foods policy against workplace violence" not only receives no citation to any record evidence, but incorrectly posits a logical fallacy that entities like US Foods, Inc. act, or make "determinations" in any way, other than through individuals humans acting on behalf of the entity. While it may well be undisputed that Abdullah violated the US Foods workplace violence policy, there is a genuine dispute as to whether Swann violated the workplace violence policy. Swann Aff., ¶¶ 38-47. In making her alleged 10/31 finding, memorialized in Exh#4, Rutherford claims she discounted her own supervisor, Butym's, statement, that no threats were made by either Swann or Abdullah, because the written statements received from Swann and Abdullah each referenced threats, independent of what Butym had to say. Rutherford, Exh.#3, 151:11-21. She claims she also discounted Summers' statement, and eyewitness account, as to no threats being made, because Summers otherwise referenced that "they were arguing and yelling." Rutherford, Exh.#3, 152:5-16. In regard to so much of Swann's written statement as references taking it outside, she says that Swann never told her that this was something that he thought or muttered to himself. Rutherford, Exh.#3, 152:17-21. She also claims Swann did not deny telling Abdullah the two could "take it outside" and she also claims that Swann also told her that he had told Abdullah that he could "punch harder". Rutherford, Exh.#3, 152-153:22-04. She received confirmation from the supervisor, Butym, however, that in Butym's presence, Abdullah had told Swann that he would "whip

[Swann's] ass." Rutherford, Exh.#3, 153:5-9.

41. and 42. There is a disputed issue of material fact as to when, and by whom, the decision was made, to discharge both Abdullah and Swann, much less by the persons, and at the time, alleged by the Defendant in this factual allegation. Defendant's letter to the Human Rights Commission, **Exhibit#6**, says the termination of both occurred on October 31, 2012. Swann says Rutherford called him up on October 31, 2012, and told him she had found he did nothing wrong, but that Mr. Pillion was to decide when Swann would be returning to work. Swann Aff., ¶ 58. The US Foods exit interview form for Abdullah, **Exhibit #7**, [placeholder; US Foods has designated this document as Confidential and the actual Exhibit must therefore be the subject of a Motion to File under seal] indicates Abdullah was terminated effective November 1, but that he was *notified* of this fact on October 31, 2012. Excerpts from the deposition of the Division President, Rick Barrett, are attached at **Exhibit #8.** He claims the "decision" to terminate Swann took place in a conference call in which he participated in David Bunk's office, with Bunk, and Rutherford also being there, and he does not recall Rutherford having any written materials, or being shown any written materials. Barrett, Exh.#8, 5:22 to 7:16. He further states that "legal" was on the call, but is unable to identify who such individual was. 18:17-20. He does not recall if anyone else was on the call, other than legal. 9:9-12. Asked if anyone gave a description as to what had happened, Barrett is directed by his counsel not to answer, and asked whether Rutherford made a recommendation as to Abdullah or Swann's fate, he is again instructed not to refer to items on the call by counsel, and his counsel rephrases the question to be limited to times *other* than the conference call, to which he replies in the negative, further denying that anyone made a recommendation to him, and concludes by answering that he concurred in the termination decision of Swann: "Because of the call and the information on the call and all

parties had agreed to the decision that was there." Barrett, Exh.#8, 10:16 to 11:17. Barrett does not know if Rutherford otherwise briefed him on anything having to do with Swann. Barrett, Exh.#8, 12:11 to 13:1 Asked if he had made the determination as to the workplace violence policy being violated, he states: "I had agreed with the decision based on the information that all of those parties that were involved had decided. I had no reason not to agree" Barrett, Exh.#8, 31:18 to 32:1, and that he concurred "based on the discussions that ensued." Barrett, Exh.#8, 32:5-7. Rutherford claims the decision to terminate Swann was not made by any one person before November 1, 2012, but was made in the telephone conversation she states is privileged, on the advice of counsel, and she does not recall furnishing the participants in the call anything in writing beforehand. Rutherford, Exh.#3, 11-13:16-10. She can only state with any certainty that Pillion would have been the only other participant in the call who had seen the written statements relating to Swann and Abdullah before the conference call. Rutherford, Exh.#3, 18:4-11. Rutherford does not recall whether she ever told Pillion that she had decided to terminate Swann. Rutherford, Exh. #3, 135:13-15. She says the decision to terminate Swann was made in a conference call with the legal department, and that Pillion had no involvement, other than on the conference call. Rutherford, Exh.#3, 136:1-10. For his part, Pillion expresses ignorance of who decided to fire Swann, variously stating it was "above me" but that he also participated in a conference call in David Bunk's office regarding that where they all went over the details and specifics. Pillion, Exh.#1, 10-11:11-06. Asked if anyone ever asked his opinion on whether Swann should be terminated, over his counsel's objection and instruction not to answer as to the 11/1/12 teleconference call ("privileged"), he states that he recalls no such conversation. Pillion, Exh.#1, 40:8-14. Pillion further states that, outside of November 1 conference call [and again, with an admonishment/instruction to not testify as to what, if anything, was said by him on

November 1 in that call], he had no conversations with the Division President, Barrett, over whether to terminate Swann, and further, that he does not recall when the decision to terminate Swann was made: "I don't know because it wasn't my decision; I don't know." Pillion, Exh.#1, 105:15 to 106:15.

42. Plaintiff was *notified* of his discharge on November 1, 2012., after being told by Rutherford the day before that her finding was that Swann had done nothing wrong, and that it was up to Pillion as to when he would come back. Swann Aff., ¶¶ 58-59. There is no genuine issue of material fact about that. That is not the same factual proposition, however, as "[both] were discharged on November 1, 2012," which appears to embrace both the decision, as well as the act/s of notification. As noted above, there is a genuine issue of fact as to whether Abullah was first notified of being discharged on October 31st, and not November 1. Further muddying this factual issue is a 11/7/12 COBRA enrollment notice letter to Swann's family, **Exhibit #10**, attendant to the separation, which shows a termination date of 11/10/12 for Swann.

There is a genuine issue as to whether both Swann and Abdullah were discharged, and/or notified of discharge, on November 1, 2012, and an even more genuine issue, as to whether the *decision* relating to each discharge notice, took place on November 1, 2012, among the lengthy cast of characters referenced by US Foods, or whether that decision was made on a wholly different date, by Pillion, who had been behind every other disciplinary action, and decision of any real consequence, relating to Swann's employment, since the accidents in June 2012, all the way through Swann's suspension until further notice by Pillion on October 26, 2012.

Argument

In considering a summary judgment motion, the District Court must view the evidence in the light most favorable to the non-moving party. Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (per curiam) (*internal citation omitted*). A dispute is genuine if a reasonable jury could return a verdict for the non-moving party. Libertarian Party of Virginia v. Judd, 718 F.3d 308, 313 (4th Cir. 2013) (*quoting* Dulaney v. Packing Corp. of America, 673 F.3d 323, 330)). A fact is material if it might affect the outcome of the suit under the governing law. *Id.* (*quoting* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

I. **National Origin**

Plaintiff concedes that there is insufficient evidence in the record for a fact-finder to find against the Defendant on the basis of national origin discrimination, and has no objection to the entry of summary judgment on his claim based upon national origin.

II. **FMLA**

a. Serious Health Condition. The Defendant's contention that the record contains no direct evidence of intent to discriminate on the basis of leave status, need for leave, or interference with Swann's ability, or right, to take leave for purposes of seeking and obtaining treatment, is entirely correct. Reviewing and remembering receiving Defendant's production items numbered 1112 through 1114 (Exh. L. to Swann Affidavit; to be filed under seal because includes medical information of non-parties), Rutherford, Exh.#3, 164:15-22, is found an e-mail in reply to another referencing various doctors giving limitations to, and keeping certain, employees, out of work due to injury. In the reply e-mail, US Foods HR official in Illinois dealing with workers' compensation issues, Carol Knuth, references a statement made to her by Rutherford that Rutherford did not want Doctors Gluck, Siddiqui and Sandoval to be "used for US Foods employees," going forward [each had either given limitations to, or kept out of work for a time, a given employee]; Rutherford denies having told Knuth that as to Gluck and Siddiqui, but confirms that as to Sandoval. Rutherford, Exh.#3, 165-166:21-17. She later backs off of this denial as to both Gluck and Siddiqui, citing a lack of specific recollection as to each. Rutherford, Exh.#3, 167:13-21. This is direct evidence of Rutherford's bias against employees who are accorded, request, or take, medically necessary leave, and she apparently expressed her hostility to medical leave-taking, by an attempt to minimize the necessity for it, by controlling in the future, who the providers are, and leaning towards providers who say the employee is not hurt, not disabled, and can come back to work immediately. In this same regard, Pillion also referenced a preference or bias taught or harbored by him, as to avoidance of "lost days," which also is direct evidence of hostility towards medically necessary, or caused, absences. Swann Aff., ¶ 17 [and Pillion testimony cited therein].

29 C.F.R. § 825.113(b) defines "incapacity" to mean ".. inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom." During such periods of time as Plaintiff did have a doctor's appointment, he needed time off of work to go to those appointments, and seek (as well as obtain) treatment. He also needed, requested, and did not receive, time off of work to obtain treatment for symptoms and conditions the US Foods workers compensation doctors were refusing to treat.

To the extent Plaintiff must satisfy the continuing treatment standard for chronic conditions set forth at 29 C.F.R. § 825.115(c), contrary to Defendant's claim, there is ample evidence in the record to support the inference, if not show outright, that the cervical radiculitis and compressed discs he has, have and/or will: (1) require/d at least two visits per year to a provider [even if Plaintiff has not been able to do so]; (2) are symptoms which have continued for a long period of time [to this day, from then, and symptoms continuing [Swan Aff., ¶ 61 & Exhibits F and ii thereto [Biddulph and Bruno records]; Swann Aff.]; and (3) may require surgery, which would "likely result in a period of incapacity," or other episodic incapacity. Both Dr. Biddulph, and Dr. Bruno, reference further treatment options with not just a neurologist, but a *neurosurgeon*. Plaintiff is entitled to the reasonable inference that patients do not get referred to neurosurgeons for circumstances that are *not* likely to result in surgery of some sort, and such a surgery would inferably not only result in a period of incapacity exceeding three days, but such a surgery, say, to relieve compression of one or both of the discs, or remove one or both discs and replace with prosthetic disc/s, would also qualify as being "restorative" in nature, having occurred after an "accident or other injury," to restore range of motion in his neck and/or left arm, as well as sensation to digits in his right hand pursuant to 29 C.F.R. § 825.115(e)(1). *Id.* Therefore, Defendant's contention that Plaintiff did not and does not suffer from a "serious health condition" is incorrect, and contrary to the seeming contention at p. 11 of Defendant's brief, the underlying accident or injury need not be work-related, in order for such a medical state of affairs to qualify as a "serious health condition."

b. Protected Activity. Plaintiff took leave and time off from work, in order to attend the appointments he *did* have, and there is ample evidence in the record to support the proposition that Defendant's actions, whether intentional or not, interfered with his: (a) obtaining timely care; and (b) actually making each appointment. This was and is protected activity under the FMLA. Plaintiff requested, twice, once on or about October 15, and again on October 19th, leave and/or time off, as well as permission from Ayers and US Foods, to go to a different doctor and seek and obtain treatment of the conditions he was already seeking treatment for, the medical details of which Ayers and Rutherford had been made aware, by the providers themselves. He also sought Ayers' permission to go ahead and be released from the threat of termination if he sought treatment from other than the US Foods workers' compensation doctors, for purposes of further diagnosis and treatment. Swann Aff., ¶¶ 31, 33. He was not accorded such permission, or the leave or time off, on either occasion. *Id.* The day after the second request, on October 20th, the hostility and coldness demonstrated to Swann by Bunk, Barrett and Ayers, at a drivers' meeting, was not only out of character for Bunk and Barrett, but also observable as to each. Swann Aff., ¶ 34. It is inferable that Ayers communicated with Bunk and Barrett, as well as her superior, Rutherford, before this occurred. The fact that Swann did not depose the other persons who were supposedly on the conference call is nothing but an invitation for the Plaintiff, and the Court, to perpetuate or participate the same tautology: "a bunch of people on a call made the decision, but we can't tell you what each said, or looked at, or why, and it's all privileged, but trust us, the decision was made in this call, and it was the violation of the workplace violence policy ." of no moment, as there is insufficient evidence in the record to support the notion that each had any active role, or decided anything, in connection with the termination. Moreover, deposing each clearly would have resulted in the same objection made in the other depositions, as to who said or decided what in that call. Defendant could put 30 people on the call if it wanted to; that does not make each "participant" or a "decision-maker." Defendant cannot set up an evidentiary "black box" as to who, how and why the decision was made, in that call, *if* any decision was made in that call (see discussion of 10/31 finding, *supra*), and simultaneously take the position that the run-in with Abdullah, or the alleged workplace violence policy violation, was the reason for the termination. Corporations act through individual human agents, and corporate decisions also come from individual, human agents. The available record evidence strongly support the inference that Pillion was the motivating force behind the termination. Defendant's refusal to specifically identify who made the decision, and why, casts doubt on its explanation. *See* Gutierrez v. City of Corpus Christi, et al., C.A. No. 2:13cv359 (S.D. Tx.

1/12/15), at 8-9.

The fake Griffith e-mail about Swann's limitations (Exh. G to Swann Affidavit; discussed at ¶ 10 of the Affidavit) likewise casts doubt upon Defendant's assertions as to who did or did not know of Swann's limitations. In this regard, Pillion stated that the transitional work agreement, for light duty, "would have come from HR," [includes Rutherford] and that he does not recall the lifting restriction Swann had ever being lifted or going away. Swann Aff., ¶ 12 [and cited exhibits and deposition testimony]. The most relevant persons to the termination decision clearly knew of the Plaintiff's limitations. It is also evident from Barrett's testimony, discussed above, that he had very little involvement, if any, in the decision to terminate [Defendant contends that no one gets to ask in any event], and Defendant's claim that Barrett had no knowledge of Swann having any health issues *of any kind* is undercut by Exh. B to Swann's Affidavit, an e-mail which Bunk forwarded to various persons, including Barrett, stating (somewhat presciently) that Swann had a "pinched nerve," to which Barrett replies with a somewhat minimizing comment: that he is glad "that's all it was." Swann Aff., Exh. B. The relevant officials for whom there exists record evidence of involvement in the decision to terminate Swann, were on notice of his limitations, as well as the previous efforts at accommodating that condition.

II. ADA

1. Temporal Proximity

Swann engaged in protected activity by receiving light duty after the June 2012 injury, and as discussed and cited to above, Pillion thought (albeit incorrectly) that Swann still had a lifting restriction as of the date he was fired. Swann Aff., ¶ 12 [and Pillion testimony appended thereto]. This would explain the reason Swann did not seem to be put back on a route, or doing anything except shuttle work, when he was fired. Swann Aff., ¶ 31. Defendant's temporal proximity argument also ignores the numerous intervening acts of retaliation visited upon Swann, by Pillion, in the period between Swann's limitations, and the firing: (i) the July 6 warning notice for Swann allegedly not giving timely notice of the injury on June 21 [discussed by Swann at ¶ 16 of his Affidavit; (ii) the July 16 threat to remove Swann from the schedule altogether if Swann did not obtain a full release [Swann Aff., ¶¶ 17-18]; (iii) the Pillion comment to Griffith in late July that he had better start distancing himself from Swann, and the subsequent distant attitude from Griffith at work [Swann Aff., ¶ 20]; (iv) the effort to make Swann look non-complaint with medical care [Swann Aff., ¶ 25 and others]; (v) the late August, baseless disciplinary action against Swann (again, Pillion) for the light duty helper's damaging of the lift jack, relating to events which had occurred more than a month before that [this followed close on the heels of the August 22nd missed neuro appointment snafu; Swann Aff., ¶ 30]; (vi) and into October, the tasking limitation of Swann to be driving only shuttles on the overnight shift, which also caused loss of incentive pay [Swann Aff., ¶ 31, (vii) the Pillion spitting attack on Swann on October 26th about a non-existent prohibition on the use of cell phones in the yard [Swann Aff., ¶¶ 48, 50]. Moreover, given Pillion's understanding (perception even) that Swann's lifting restriction never went away, and the readily inferable fact that the limitation to shuttle duty at night (more than arguably, an ongoing accommodation), Swann's protected activity, and/or receipt of that accommodation, continued through the date he was terminated. Even if the Court did not accept the notion that the accommodation of Swann's limitations was ongoing in nature, these intervening acts of retaliation support an inference of causality, as to all of Plaintiff's retaliation claims, whether under the FMLA, or the ADA. Lettieri v. Equant, Inc, 478 F.3d 640, 650 (4th Cir. 2007) (*internal citation omitted;* temporal proximity may be furnished by intervening acts of retaliation).

2. Intervening Cause

In order for this particular argument of Defendant to hold any weight, the Court must necessarily agree that there is no genuine issue of material fact as to whether the termination of Swann, for the averred workplace violence policy violation, is pretextual in nature. As demonstrated above, there is ample evidence in the record to support the inference that the reason given for the discharge, the zero tolerance policy violation, was not the real reason for the discharge. The Court should also note that other acts of retaliation and/or discrimination visited upon Swann, as described in his Affidavit, and herein, by US Foods, were and are sufficiently adverse to be independently actionable, even if the discharge were not [it is], under the standards set forth in Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53 (2006) (assignment of less desirable duties and suspension without pay sufficient to be actionable as retaliation; "reasonable employee would have found the challenged action materially adverse).

III. Prima Facie Case of ADA Discrimination

1. Disability Cognizable under the ADA & ADAAA

This portion of Defendant's argument seems would have the Court wholly ignore the 2008 Amendments to the ADA, as far as what can qualify as a major life activity, and what qualifies as a substantial limitation. The law relied upon by Defendant is outdated. The non-exhaustive list of major life activities listed in Section 4(4)(A) of the Amended Act includes lifting as a major life activity, and major bodily functions under that law, also include neurological items. 42 U.S.C. § 12102(2)(A) and (B). That same law also removes from the "regarded as" prong, the requirement that an individual demonstrate that the impairment he has, or his perceived to have, limits a major life activity in a way that is perceived to be substantial, and instead says that the employee is to be regarded as disabled if he or she is subjected to an action (e.g., interference with medical care, tasking to do only shuttle work, termination) based upon a condition that is not transitory and minor. 42 U.S.C. § 12102(3)(A) and (B). Swann's diagnoses, and conditions, arguably qualify under the actual disability prong, as well as the perceived disability prong. Swann Aff., Exhibits F and ii. The cervical spondylosis and compressed discs, and attendant nerve problems running down his right arm, and reducing by 17% (without further treatment, says Dr. Bruno) his use of his left arm (Exh. ii to Swann Aff., Dr. Bruno records) are not transitory and minor conditions. These qualify as an actual disability under the ADA, as amended. It should also be noted that the authorities cited by Defendant, and argument, are precisely the type of grudging application of the definition of disability under the ADA, that the amendments, as well as regulations pursuant to the amendments, were supposed to have explicitly rejected, in the text of the law itself. 42 U.S.C. § 12102(4); 29 C.F.R. § 1630.2(i) and (j). Defendant's argument in this regard, is a somewhat intricate mosaic which misrepresents the current state of the law.

IV. Comparators

The central thrust of Defendant's argument here is that the comparators Swann has been able to obtain evidence about, (discussed in the disputed facts above) evidence of, are not sufficiently "similarly situated" in a sufficient amount of relevant respects. However, those cases appear not to have involved an alleged "zero tolerance" policy, which has supposedly always been the same. If, as Defendant claims, and as appears to be the case, the paper policy has always been of a zero tolerance nature, then a complete identity of HR personnel involved, for example, should not be necessary. If the Court were to accept Defendant's argument, and deem the "privileged" conference call participants as being decision-makers, then even if the other situations involving Howard and Hommel did involve both Rutherford and Pillion, in every instance, according to Defendant, this *still* would not be enough for those persons to occupy valid status as comparators, as the conference call allegedly involved other persons on the line. It should also not be ignored that Pillion is a common denominator of all of the situations cited by Swann: (a) Kelvin Howard; (b) John [the jilted boyfriend], (c) Bruce Hommel, and (d) Abdullah himself, as to previous [unspecified] threats to *a customer* made to a management official, Joynes, and (e) Swann. It is precisely this illusory "requirement" of "identity" of decision-makers, which Defendant attempts to manipulate away by claiming that a whole host of people who have never gone anywhere near Manassas, and were not furnished any of the items from Rutherford's investigation, were on the "conference call." If destroying comparator status were so easy as including an additional person (the janitor?) on a "privileged" conference call purportedly involving termination, then every employer would have an easy route to defusing each and every claim of disparate disciplinary action, which comes along, simply by putting an attorney and a "warm body" employee on the call, after the decision had been made (as here). This type of thing is not dissimilar to judicial efforts to avoid a piercing of the corporate veil, by having a "shill" allegedly own some of the stock, so that an "identity" of stockholders cannot be proven. As the Defendant would have it, establishing comparator status should be no easier than piercing the corporate veil, something which is well known among lawyers and judges as being something quite difficult to achieve indeed, under applicable. law.

V. Pretext

As discussed above, both Pillion and Rutherford made comments showing a bias against employees with limitations, and employees who take leave, and/or the doctors who provide notes allowing them to take leave, from work. That is direct evidence of bias against the types of things Swann was involved in. Also as discussed above, there is ample evidence to support the proposition, to a jury and otherwise, that the claim of a workplace violence policy violation by Swann, was (and is) pretextual in nature. In this regard, Defendant wants to have the Court apply a mechanistic, "too much time has passed" argument to convince the Court that comparison information of two different situations involving Kelvin Howard should not be considered for purpose of pretext analysis. The precedent in this District is that that inference of discrimination or retaliation arises through comparison to an employee from a non-protected class where the comparator is "similarly situated" in all *relevant* respects. Crawford v. Dept. of Correctional Education, 3:11cv430-HEH (E.D. Va. 11/29/11), *affirmed*, 472 Fed. Appx. 192 (4th Cir. 2012) (italics added). As discussed above, Pillion is involved as the deciding official, initiating official, and disciplining official, and Pillion was the supervisor of each, in every situation cited by Swann, regardless of how far back they go in time. In addition, as discussed above, and cited to above in the record, the purported "zero tolerance" nature of the policy had not changed during any of the time periods involved with the comparators. As such, whether or not Rutherford was the HR Director, or whether Barrett was divisional President at such time, are almost entirely irrelevant to this inquiry, as a policy violation finding, according to the Defendant, should all but "automatically" result in a termination decision which is, in effect, self-executing. There is no substantive evidence whatsoever in the record to support the notion that any of the participants in that call, other than Pillion and Rutherford, made any decision or recommendation, much less one to terminate Swann.

It should also be not forgotten that, in the administrative proceedings, Defendant: (a) claims that both Abdullah and Swann were terminated on October 31, 20-12; and (b) denied *any* workplace violence policy violation by Kevin [Kelvin] Howard [Exh. 6], where other evidence in the record, discussed above, shows Howard was in fact suspended, and/or received a "writeupe" for acts that clearly would or did fall under the provisions of Defendant's policy. For ease of reference, a copy of the the 2008 iteration of the policy, produced by Defendant as #3005-3007, is attached at **Exhibit #11.**

Moreover, a strong argument can also be made that the privilege does not, and never did, apply to the conference call, and that Defendant's assertion of privilege, in connection with that call, is also a cover up. In this regard, the attorney-client privilege is an exception to the general duty to disclose, is an obstacle to the investigation of the truth, and should be strictly construed. Via v. Commonwealth, 42 Va. App. 164, 590 S.E.2d 583 (Va. App. 2004). The privilege may be waived by the client, either expressly, or implied from conduct. Grant v. Harris, 116 Va. 642, 648 (1914) (*citing* Blackburn v. Crawford, 3 Wall. 175, 18 L. Ed. 186; *and* Clover v. Patton, 165 U.S. 394, 407-8)). The facts in this case are that Defendant claims the "decision" to fire Swann was made in a "privileged" conference call, a situation where Defendant seeks to secure an advantage, and completely obscure what, if any decision-making process, occurred in that call, by claiming *this* was when the termination decision as to Swann (as well as Abdullah) was made, and who was involved, but not how, by going into its own relations with an attorney. The privilege only applies if: (1) the asserted holder is a client; (2) the person to whom it was communicated is a member of the bar of a court; (3) the communication is made by the client, with no strangers present, for purposes of seeking *primarily* either: (a) an opinion of law; (b) legal services; or (c) assistance in some legal proceeding, and *not* (d) for the purpose of committing a crime or a tort; and (4) the privilege has been claimed, and not waived. United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). Leaving aside that there is no evidence that an actual member of some bar was on the call, claims under the ADA and FMLA are statutory torts, and there is a strong argument here that the privilege was and is being claimed, in furtherance of, or in order to avoid a finding of liablity for, those statutory torts. Defendant has waived the privilege here by putting "into issue" its claim that the decision to fire Swann was made in that call, as opposed to before that. Grant v. Harris, *supra*, 116 Va. at 648. Given that overlay, Plaintiff should be, on summary judgment, and otherwise, entitled to an inference adverse to the Defendant, that the information withheld under this privilege claim would be detrimental to Defendant's case, or at the least, that the Defendant's claim of the "decision" being made in that call, should be given no credence or consideration whatsoever.

WHEREFORE, your Plaintiff respectfully respects that this Honorable Court deny Defendant's Motion for Summary Judgment, as relates to his FMLA and ADA interference with rights, discrimination, and retaliation claims, and for such other and further relief as is appropriate to the premises of law, equity and the facts of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, counsel of record for Plaintiff, do hereby certify that on this 4th day of May, 2015, I filed the foregoing Memorandum with the Clerk of Court, using the CM/ECF system, which will generate a Notice of Electronic Filing (NEF) regarding the filing, and forward copies of NEF and this Memorandum, and the Exhibits thereto, to the following:

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